

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration and

Materials Transportation Bureau

49 CFR Part 179

[Docket No. HM-144]

Statement of Enforcement Policy on
Tank Car Retrofit

AGENCIES: Materials Transportation Bureau and Federal Railroad Administration, DOT.

ACTION: Statement of enforcement policy.

SUMMARY: The Materials Transportation Bureau (the Bureau) and the Federal Railroad Administration (FRA) have found it necessary to issue a statement of policy explaining the legal sanctions available for enforcement of the requirements for retrofit of DOT Specification 112 and 114 tank cars issued under Docket No. HM-144. This explanation is responsive to an incorrect and misleading characterization of applicable legal sanctions contained in a National Transportation Safety Board (NTSB) Report on the FRA track safety and hazardous materials safety programs. This statement of enforcement policy is intended to dispell any misimpressions which the NTSB statement may have engendered concerning the adequacy of legal remedies and the determination of the Department to assure that tank car owners comply with the established retrofit schedule.

FOR FURTHER INFORMATION CONTACT: Grady C. Cothen, Jr., Office of Chief Counsel, Federal Railroad Administration, 202-426-8220.

SUPPLEMENTARY INFORMATION: *Retrofit requirements.* On September 15, 1977, the Bureau published in the **Federal Register** (42 FR 46306) final rules requiring that DOT Specification 112 and 114 tank cars be equipped with shelf couplers and tank head protection. Cars used to transport flammable compressed gas were also required to be equipped with thermal protection. A timetable was established for the retrofit of existing cars.

On July 13, 1978, the Bureau published in the **Federal Register** (43 FR 30057) a final rule that established a shortened retrofit schedule. Shelf couplers were required to be applied not later than December 31, 1978. Additional deadlines were set as follows:

1. Existing specification 112 and 114 tank cars used to transport flammable

gases such as propane, vinyl chloride and butane, whose owners have elected to retrofit with jacketed insulation and integral tank head protection (known as the "J" retrofit), are to be retrofitted over a 3-year period ending on December 31, 1980.

2. Existing specification 112 and 114 tank cars used to transport flammable gases such as propane, vinyl chloride and butane, whose owners have elected to retrofit with a nonjacketed thermal protection system and tank head protection (known as the "T" retrofit) are to be retrofitted with tank head protection over a 2-year period ending December 31, 1979, and with the nonjacketed thermal protection system over a 3-year period ending on December 31, 1980.

3. Existing specification 112 and 114 tank cars used to transport anhydrous ammonia exclusively (the "S" retrofit) are to be retrofitted with tank head protection over a 2-year period ending on December 31, 1979.

The amended regulation further provides that certain percentages of the cars subject to the "J" retrofit must be completed at the end of each of the three years allotted for that portion of the program. Specifically, 20 percent of those cars were required to be completed by December 31, 1978. By the end of calendar year 1979, 65 percent of the cars must be retrofitted. The remaining 35 percent of the cars must be completed in 1980. 49 CFR 179.105-3(d)(3).

Tank car owners are required to report retrofit elections and progress on a quarterly basis. 49 CFR 179.105-9 (43 FR 39792; September 7, 1978). While some latitude has necessarily been allowed for changes in elections through the current year based on availability of shop capacity and materials or changes in use (e.g., from flammable compressed gas to exclusive anhydrous ammonia service), the greatest portion of the retrofit effort must be completed by the end of this year.

A maximum of 35 percent of the cars designated to receive the "J" retrofit may remain in transportation after the end of this year. This percentage completion requirement applies to each tank car owner. All other 112/114 tank cars must be completed (or withdrawn from flammable gas and anhydrous ammonia service) by the end of this year. A tank car owner who fails to complete the retrofit of 65 percent of those cars designated for the "J" retrofit would be required to withdraw a sufficient number of cars from service to come within the 65 percent requirement. Obviously, since maintaining cars in

flammable gas or anhydrous ammonia service is a voluntary business decision, a tank car owner cannot be compelled to maintain any specific number of completed cars in hazardous materials service. Nor would the public safety be endangered by the use of those cars for the carriage of non-hazardous products.

NTSB error. On March 8, 1979, the NTSB adopted a report entitled "Safety Effectiveness Evaluation of the Federal Railroad Administration's Hazardous Materials and Track Safety Programs" (Report No. SEE-79-2). In commenting on the retrofit requirement, the NTSB stated:

As of December 31, 1978, there were about 1,400 tank cars that did not have the required shelf couplers. The penalty for not complying with the regulation is holding out of service the unequipped tank cars. *The percentage completion requirements in the regulation have no binding legal sanctions. The only provision to enforce the application of the head shields and thermal protection before the last day of 1980 is by use of Section 111(b) of the Hazardous Materials Transportation Act.* If the Secretary can show that a failure to retrofit the required number of tank cars constitutes an "imminent hazard," he may petition an appropriate district court of the United States for an order to eliminate or ameliorate such imminent hazard.

Id. at pg. 10 (emphasis added). While it is true that approximately 1,268 cars out of a total of approximately 17,454 were cars withdrawn from service at the beginning of 1979 in order to complete the application of shelf couplers, those cars obviously posed no threat to the public while so occupied. Observance of the deadline provided the intended protection to the public.

Cars not in compliance with the retrofit deadlines must be withdrawn from service *if direct sanctions are to be avoided.* However, the balance of the NTSB quotation appears to imply that the percentage completion requirement could be violated and cars continued in service without the application of any "binding legal sanctions." That statement is incorrect and could, if accepted as official government policy, influence the actions of those subject to the regulations.

The requirements of Docket No. HM-144 were issued under the authority of the Hazardous Materials Transportation Act of 1974 (49 U.S.C. 1801 et seq.) [Act]. Subsection 110(a) of the Act (49 U.S.C. 1809(a)) provides for the assessment by the Secretary of Transportation of a civil penalty of up to \$10,000 for each violation of any regulation issued under the Act. Each day of violation constitutes a separate offense.

Subsection 110(b) (49 U.S.C. 1809(b))

provides that any person who willfully violates a regulation issued under the Act is guilty of a criminal offense and is subject to a fine of not more than \$25,000, imprisonment for a term not to exceed 5 years, or both.

Subsection 109(a) (49 U.S.C. 1808(a)) authorizes the Secretary, after notice and an opportunity for hearing, to issue orders directing compliance with regulations issued under the Act. Compliance orders, which can be enforced in the district courts, may contain such ancillary provisions as necessary to assure compliance. See 49 CFR Part 209 (42 FR 56742 (1977)).

Clearly, the provisions cited above are "binding legal sanctions" adequate to deter violations of the percentage completion requirements.

Statement of policy. It is the policy of the Bureau and the FRA, which is responsible for enforcement of legal sanctions with respect to shipment or transportation of hazardous materials by rail, that compliance with the percentage completion requirements will be monitored closely and that any legal action necessary to assure compliance will be undertaken.

(49 U.S.C. 1801 et seq.; 49 CFR 1.49(t).)

Issued in Washington, D.C., on July 10, 1979.

John M. Sullivan,

Federal Railroad Administrator.

L. D. Santman,

Director, Materials Transportation Bureau.

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